Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-236

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

vs.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

MOTION OF APPELLEES

South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company and The Western Union Telegraph Company to Dismiss Appeal or Affirm Judgment of State Court

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Come Appellees, South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company and The Western Union Telegraph Company and pursuant to Rule 16 of this Court respectfully move the Court to dismiss the appeal, or in the alternative to affirm the judgment of the state court, upon the following grounds:

1. The appeal was not properly docketed in this court within the required time.

2. The federal question sought to be reviewed has been so plainly foreclosed by decisions of this court as to render the federal question unsubstantial and make further argument unnecessary.

STATEMENT OF THE CASE

References herein shown as (A-. . .) are to the Appendix attached to Appellant's Jurisdictional Statement. References to the Jurisdictional Statement will be designated as (JS . . .).

This is an action brought by the Metropolitan Development and Housing Agency for a declaratory judgment. The Agency contends that a Tennessee statute requiring said Agency to pay relocation costs for utility facilities located in public rights of way when displaced by urban renewal projects, is invalid under the contract clause of the U. S. Constitution. As concerns the utility companies (all of the Appellees except the Electric Power Board) the Agency contends that under franchise agreements between the City of Nashville and the respective utilities (to which agreements the Agency is not a party) the Agency has a right to have such relocation costs borne by the utilities and that said statute impairs that right.[1]

The state courts below held that the Appellant, being a subordinate state agency, cannot claim the constitutional protection of the contract clause against action by the state, its creator.

Certain statements in Appellant's "Statement of the Case" are inaccurate and should be challenged:

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[1] Appellant also mentions contracts between it and the Department of Housing and Urban Development as being in some way impaired. But the Court of Appeals opinion notes that no contracts with H.U.D. appear in the record. (A-24).

1. Appellant refers to the Tennessee Court of Appeals assumption *"arguendo* that plaintiff is in the position of a party to all the contracts involved, that the franchise contracts do require relocation of defendants' facilities at defendants' cost, and that there has been some impairment of all the contracts involved." Appellant then says that the Tennessee Court of Appeals in its Opinion "affirmed for the purposes of its Opinion that the factual issues in dispute were resolved in favor of the plaintiff. . . ." (JS, page 4) It is plain that none of said so-called factual issues were "affirmed" or "resolved" in favor of the plaintiff. The trial court had found that the "plaintiff is not a party to any contract with these utilities, therefore the statute does not affect any agreements between the parties." (A-18; A-25) The Court of Appeals did not pass on that or the other issues mentioned by Appellant. On the contrary, the court stated that "We emphasize that we decide none of these points, and that there is serious doubt about many of them, but that we assume them in order to reach the dispositive issue in the case." (A-26)

2. Appellant states in a footnote that "Once a housing authority is created, it becomes an agency of the city and *not a state agency.*" (emphasis added) Appellant cites *Knoxville Housing Authority v. City of Knoxville,* 174 Tenn. 76, 123 S.W.2d 1085 (1939) in support of that statement. (JS 5) In the *Knoxville* case the Court said that property held by the housing authority "is a holding by the City of Knoxville" within the sense of a state constitutional provision excluding from taxation property held by the state, counties, cities or towns. Nowhere in the cited cases did the court say that the housing authority was "not a state agency".

3. Appellant states that in the franchise agreements the utilities agreed with the city that they "would relocate their utility lines and facilities at their own expense if said relocation became necessary or required by the city;" and Appellant further states that the franchise agreements "required the utility com-

panies to relocate their facilities at their own expense when requested to do so by the City of Nashville." (JS 6) These statements are not substantiated by anything in the opinion of the Court of Appeals. Although Tennessee follows the common law rule that uncompensated relocation can be required under the police power Appellees have insisted at all times that the language of the franchises, granted many years before the advent of urban renewal, is not so broad as to impose any *contract obligation* to relocate to accommodate urban renewal projects. (A-45; A-53-54; A-67; A-73-75).

In any event, the City of Nashville (now Metropolitan Government of Nashville and Davidson County) which granted the franchises has not requested relocation and, significantly, was never made, and did not seek to become, a party to this case.

ARGUMENT

The Appeal Was Not Properly Docketed in This Court Within the Required Time.

An appeal not only must be "taken" within 90 days (or properly extended period) after the entry of the state judgment but the appeal must also be "perfected". The perfection of the appeal is accomplished by docketing the case in this court as provided in Rule 13. U.S. Supreme Court Rule 10, Paragraph 1.

Rule 13 requires that "Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule. . . ." U. S. Supreme Court, Rule 13, Paragraph 1. Paragraph 2 of Rule 13 requires, among other things, the filing by Appellant of a jurisdictional statement "which shall comply in all respects with Rule 15. The case will then be placed on the docket".

Rule 15, with which the jurisdictional statement must comply, requires that a copy of the notice of appeal "shall be appended" as provided in subparagraph (j): and subparagraph (j) mandates that "There shall be appended to the statement a copy of the notice of appeal showing the date it was filed and the name of the court where it was filed."

No copy of the notice of appeal was appended to Appellant's jurisdictional statement in the present case. Although Appellees are advised that a notice of appeal was timely filed with the clerk of the Supreme Court of Tennessee, Appellees are further advised that no copy of that notice was ever filed in this court until on or after August 15, 1978, notwithstanding the fact that the time (as extended) for docketing the appeal expired August 10, 1978.

Therefore, the case has not been timely and properly docketed in this court as required by the rules.

The Federal Question Sought to Be Reviewed Has Been So Plainly Foreclosed by Decisions of This Court as to Render the Federal Question Unsubstantial and to Make Further Argument Unnecessary.

This court has held a number of times that an appealed decree or judgment of a state court will be affirmed on motion where the question urged as a basis for reversal has been so plainly foreclosed by prior decisions of this court as to make further argument unnecessary.

Missouri Pacific R. Co. v. Castle, 224 U.S. 541 (1911); *Chicago, R. I. & P. R. Co. v. Devine*, 239 U.S. 52 (1915); *City of Boston v. Jackson*, 260 U.S. 309 (1922); *Minneapolis, etc., R. Co. v. Merrick Co.*, 254 U.S. 376 (1920); *Utley v. St. Petersburg*, 292 U.S. 106 (1934), *rehearing denied*, 292 U.S. 604. Such an appeal presents no substantial federal question. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Zucht v. King*, 260 U.S. 174 (1922).

In Appellant's Statement of the Case it is conceded that Appellant is a subordinate governmental agency created pursuant to state statute. (JS 4) T.C.A. 13-904[2] expressly provides that it is "a public body corporate and politic." While it is in some respects an agency of the municipality it is no less a state agency than is the municipality itself. Under the law of Tennessee it performs a governmental function and is engaged in an exercise of the State's police power. *Bristol Housing Authority v. The Bristol Gas Corporation*, 219 Tenn. 194, 407 S.W.2d 681 (1966).[3] As a creature of the state its rights,

[2] Appended hereto.

[3] The Bristol case arose and was decided before the enactment of T.C.A. 13-828—833, the reimbursement statute involved in the present case. Therefore, pursuant to the common law rule which prevails in Tennessee in absence of statute, the Gas Company was required to relocate its facilities without compensation.

powers and duties, indeed its continued existence, can be changed or terminated by the state at any time.

For more than a hundred years the principle has been established and adhered to by decisions of this court that a governmental entity which is an arm or agency of the state cannot invoke the contract clause of the Constitution against legislative action of the state which created it. *City of Worcester v. Worcester Street Railway Company*, 196 U.S. 539 (1905); *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79 (1891); *Tippecanoe County v. Lucas*, 93 U.S. 108 (1876); *Williams v. Baltimore*, 289 U.S. 36 (1933).

The authorities cited by Appellant do not depart from this established principle. On the contrary, they support it. Appellant's main reliance appears to be upon *United States Trust Company v. New Jersey*, 431 U.S. 1 (1977), but that reliance is misplaced. In that case New York and New Jersey, in 1962, had entered into a statutory covenant with each other *and with the holders of bonds issued by the New York Port Authority*, which covenant restricted the expenditure of revenues pledged as security for the bonds. Later in 1978 both states passed a statute repealing the 1962 statutory covenant. The United States Trust Company *as trustee for bond holders and also as a bond holder itself*, brought suit to declare the 1973 Act unconstitutional as impairing the obligations of the bond holders' contract. New Jersey's defense was that the 1973 Act was a reasonable and valid exercise of the police power and therefore immune from the reach of the contract clause of the Constitution. The Court struck down the 1973 statute, holding that it clearly impaired the obligation of the state to the bond holders and that such impairment, under the circumstances shown in that case, was not the result of a reasonable and valid exercise of the police power. The decision offers no support to Appellant in the present case because there the bond holders who had dealt with the state agency were objecting to

the impairment of an obligation owed *from* the state to them, whereas in the case at bar the state agency is objecting to the impairment by the state of an alleged obligation owed *to* the state or one of its governmental subdivisions.

Appellant, throughout this litigation, has refused to recognize that there is a very real and valid distinction between a case in which the state, by statute, releases or "impairs" an obligation *due to* the state or state agency (which is the alleged case at bar), and a case in which the state, by statute, impairs an obligation *due from* the state or state agency to private parties (which is *United States Trust Company v. New Jersey*).

Furthermore, even as affects the non-public party to a contract, contract rights like property rights are not immune from modification resulting from a valid exercise of the State's police power. *Chicago, etc., Railroad Company v. Nebraska,* 170 U.S. 57 (1898); *Northern Pacific Railway Company v. Minnesota,* 208 U.S. 583 (1908); *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934). T.C.A. 13-828-831 is an enactment in the proper exercise of the State's police power and the legislative findings and declarations so show (A-1), (A-31) *Cf Pack v. Southern Bell Tel. & Tel. Co.,* 215 Tenn. 503; 387 S.W.2d 789 (1965) (statute providing reimbursement of utility relocation expenses occasioned by interstate highway system upheld as valid exercise of police power).

CONCLUSION

Since the present case involves only an attempt by a state subordinate agency to invoke the contract clause of the Constitution against action by the state legislature, the federal question has been so plainly foreclosed by repeated decisions of this court as to render it unsubstantial and make further argument unnecessary. The appeal should be dismissed or the judgment of the State Court affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

13-904. Authority a public body corporate.—When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners, a certificate of incorporation pursuant to the Housing Authorities Law, under the seal of the state, and shall record the same with the application. [Acts 1935 (E. S.), ch. 20, § 4; C. Supp. 1950, § 3647.3 (Williams, § 3647.4).]